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NO. 96-1494

IN THE

Supreme Court of the United States

October Term, 1997

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

I. THE CONSTRUCTION OF CERCLA SECTIONS 101(14) AND 107(A) URGED BY THE GOVERNMENT WOULD PERPETUATE THE ARBITRARY AND INDISCRIMINATE IMPOSITION OF SUPERFUND LIABILITY.

In opposing Alcan's Petition for Writ of Certiorari, the Government asks this Court's blessing of a construction of CERCLA section 101(14) which undisputedly would render everything in the universe a "hazardous substance". At the same time, the Government asks the Court to endorse the view that CERCLA section 107(a) requires no proof of causation by the plaintiff--at least when that plaintiff is the Government. Under the Government's construction of these tandem provisions, it may recover 95% of its response costs from a generator who disposed of dirt and stone[1] in a landfill being remediated for PCBs, after EPA has settled with a generator who disposed of pure PCBs. If the Court agrees that there is serious reason to doubt that this is what Congress had in mind when it enacted CERCLA, then the Court should review this case.

According to the Government, the Court need not concern itself with outcomes and should simply countenance the mechanical application of an "explicit" statutory definition.[2] In response to Alcan's

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[1]Dirt and stone contain far higher concentrations of the metal compounds than did the Alcan Emulsion.

[2]In fact, the Government picks and chooses when and when not to apply "explicit" statutory language. For example, as we point out below, CERCLA has no explicit language directing that section 107 liability be applied retroactively.

argument that without implicit thresholds the definition of hazardous substances makes no sense and is impermissibly vague, the Government agrees that a statute is void for vagueness if it "fails to give an ordinary person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." Gov. Brief at 10. However, the Government does not explain how a person contemplating the disposal of dirt and stone would have "fair notice" that he might someday be forced to remediate a site where the problem is PCBs, while the generator of those PCBs effectively has been insulated from significant liability by EPA. Yet, that is what this case is about. That is what happens regularly in CERCLA and will continue to happen unless this Court reviews this case.

II. THE RECENT DECISIONS IN *LICCIARDI* AND *ACUSHNET* BELIE THE GOVERNMENT'S CONTENTION THAT THIS CASE INVOLVES A MERE FAILURE OF PROOF, NOT A CONFLICT AMONG THE CIRCUITS REGARDING CAUSATION.

The Government tries to portray this case as a "fundamental and deliberate failure of factual proof," claiming that Alcan refused to put on any evidence concerning the divisibility of harm associated with its waste at the Butler Tunnel site. What the Government neglects to mention is that the district court on remand resolved this case *on summary judgment without a hearing despite uncontroverted facts* that (1) no response was directed toward metals and (2) Alcan's Emulsion contained none of the hazardous substances

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Nonetheless, the Government does not hesitate to look beyond the statutory language to find justifications for retroactive application.

for which response costs were expended.[3] Hence, whether or not commingled with the wastes of others, the Emulsion could not possibly have contributed any of the substances at which the response was directed.[4] In fact, summary judgment was rendered against Alcan on the ground that it did not demonstrate that its Emulsion was "environmentally benign". *Alcan-Butler II*, 892 F.Supp. at 655-56. As we stated in our Petition, nothing is environmentally benign; even water in excess can be environmentally detrimental. If Alcan is guilty of a "failure of proof," it is the failure to prove the impossible.

This case is about conflicting legal standards, not a failure of proof. While acknowledging the causation requirement imposed on the plaintiffs in *Acushnet Co. v. Coaters, Inc.*, 937 F.Supp. 988 (D. Mass. 1996), (applying the First Circuit's position), the Government suggests that *Acushnet* is distinguishable because the case involved private plaintiffs who "sought a more sweeping elimination of causation . . . than the Third Circuit adopted here." Gov. Brief at 11. The Government elaborates no further on its meaning. It is hard to imagine a more sweeping elimination of causation than the burden-shifting "environmentally benign" standard the Third Circuit adopted here.[5]

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[3]*See United States v. Alcan Aluminum Corp.*, 892 F.Supp. 648, 654 and n.9 (M.D. Pa. 1995) [*Alcan-Butler II*]. Nothing in the record supports the Government's assertion that Alcan "refused" a hearing.

[4]The Government's contention that Alcan put on no evidence that its emulsion, when mixed with other hazardous substances at the site did not contribute to the response costs is therefore irrelevant.

[5]The plaintiff in Acushnet failed to establish the necessary causal link between defendant NETT's waste and the

Furthermore the Government gives no reason for seeking special treatment as a plaintiff when the statute gives it none.

The Government contends that the Eighth Circuit in *Farmland Indus., Inc. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335 (1993) supports the elimination of causation as an element of section 107 liability when the government is the plaintiff. That case, however, simply holds that causation is required in a contribution action among PRPs, and in that regard is consistent with the ruling in *Acushnet* that CERCLA liability requires causation.

The Government's mistaken reading of *Farmland* stems from the court's discussion of the propriety of "previous case" jury instructions. In the previous case the district court had held appellant Morrison-Quirk, a landowner-defendant, liable to EPA. Morrison-Quirk's liability in the previous case arose from the fact that during its tenure as landowner, the release of a hazardous substance, Max-Kill 10, had occurred on its property. Max-Kill 10 was the substance driving the EPA's response action. On appeal of the contribution action, the Eighth Circuit held the jury instructions improper because they could have confused the jury in determining causation.

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response costs incurred--even though NETT's wastes were undisputedly "hazardous" and remarkably similar to the wastes driving the response. It is equally hard to imagine why the plaintiff in this case should have no burden of proof whatsoever, particularly since the "hazardous" substances in the Emulsion--below background metals--are completely distinguishable from the substances which necessitated the response at Butler Tunnel.

The Eighth Circuit did not review or discuss the merits of the previous case, which was not appealed. Indeed, causation was irrelevant in the previous case. As a landowner at the time of a release on it property, Morrison-Quirk would have been liable under CERCLA section 107 regardless of who generated the Max-Kill 10 or actually caused the release. Moreover, as the landowner Morrison-Quirk would have been liable to any plaintiff, whether that person was the government or a private party. Hence, *Farmland* lends no support to the Government's claim of a special liability-without-causation standard for itself, nor does it support the Government's claim of uniformity among the courts of appeals on the issue of causation.

The Government neglects to mention the Fifth Circuit's recent decision in *Licciardi v. Murphy Oil USA*, U.S. App. LEXIS 7920 (April 22, 1997)[6], let alone address its exacerbation of the conflict among the circuits regarding causation. In *Licciardi*, a private-plaintiff section 107 action, the Fifth Circuit held that the plaintiffs must prove the release caused response costs to establish liability. Following the Government's logic, *Farmland* would enable it to establish liability when the *Licciardi* plaintiffs were unable to do so under similar facts. The Government apparently believes that had it sued Murphy Oil instead of the *Licciardi* plaintiffs, it would have won in the Fifth Circuit. That seems quite implausible. Equally implausible is the converse--that had the *Licciardi* plaintiffs been able to file their case in the

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[6]*Licciardi* was published more than a month before the Government filed is Brief in Opposition in this case and is addressed in Alcan's Supplemental Brief on New Authority filed with this Court on May 21, 1997

Eighth Circuit, they would have won. This only accentuates the confusion among the Circuits and demonstrates the need for this Court's review.

If *Farmland* truly stood for the elimination of causation as an element of section 107 liability where the government is the plaintiff, it would conflict sharply with the position of the Second and Third Circuits in the *Alcan* cases. The *Alcan* cases are in conflict with the Government's characterization of *Farmland*, since they import causation into the liability scheme in section 107 cases brought by the Government (albeit through the "back door").[7]

Nothing in the Government's opposition justifies its position that it need not show *any* causal connection between a defendant's waste and the response costs it is seeking to recover. The Government simply observes that Congress deleted language from CERCLA which would have imposed liability on "any person who caused or contributed to the release or threatened release" because "it was aware of the difficulties plaintiffs would confront in the multi-generator context if required to prove such a connection." Gov. Brief at 13 n.10. This observation concerning difficulty of proof makes no distinction between and government plaintiffs and private plaintiffs.[8]

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[7]The confusion in the law is further dramatized if one considers that if the Government wishes to enter into consent decrees with certain generators in the context of a government initiated case under section 107, the court must first evaluate the fairness of the decree, including an evaluation of the causal connection between a settling party's waste and the response costs.

[8]We might agree if the issue were whether the Government had to show it was one molecule of TCE versus another

The Government offers no public policy reason, no scientific basis and no common sense justification for its contention that Congress intended private parties to prove causation in section 107 and contribution actions while excusing the government from doing so. Congress could not possibly have intended CERCLA to relieve a technically sophisticated agency like EPA--with a dedicated internal legal staff as well as a specialized enforcement arm in the land and resources division--from the burden of proving a causal connection due to "difficulty of proof", particularly when that burden is regularly imposed on private plaintiffs by courts interpreting the identical statutory language. It is precisely because the Government fails to offer a single plausible justification warranting its special treatment that this Court should review this case.

III. ALCAN PROPERLY CHALLENGED THE COURT'S JURISDICTION TO IMPOSE RETROACTIVE LIABILITY UNDER CERCLA SECTION 107.

This Court should review this case because the *Butler II* panel, without explanation, failed to consider Alcan's motion to dismiss for lack of subject matter jurisdiction under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The ruling in *Butler I* predated this Court's decision in *Landgraf*. The district court's authority on remand was limited to determining

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molecule of TCE which caused the problem before it could impose liability for TCE-related cleanup costs. That is not the type of proof we are discussing. The proof we are discussing is precisely the same that a plaintiff would face in a toxic tort case--that is, did the type of waste contributed by a particular defendant cause plaintiff's alleged injury? This is precisely the same proof that the courts required in *Licciardi* and *Acushnet*.

divisibility. Thus, Alcan properly raised the retroactivity issue on motion before the Third Circuit in *Butler II*. The parties comprehensively briefed the motion, yet the *Butler II* panel entirely ignored it. We believe it is wholly inappropriate for a federal appeals court to ignore a legitimate challenge to its subject matter jurisdiction.

The Government concedes that CERCLA is its sole basis for invoking federal jurisdiction. If CERCLA does not apply retroactively, there not only is no cause of action--there is no federal subject matter jurisdiction--a challenge that can never be waived.[9]

The Government claims the legislative history of CERCLA supports its view that Congress intended section 107 to impose retroactive liability. Simultaneously it criticizes the brief filed with this Court by defendants Beazer Materials and Services, Inc., et al. ("Beazer"), for contending that the legislative history supports the opposite conclusion. The Government criticizes Beazer's brief because "it

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[9]The Government relies exclusively on *Bell v. Hood*, 327 U.S. 678 (1946) for the proposition that Alcan waived its right to challenge the retroactive application of CERCLA. Gov. Brief at 16. However, this Court has given only limited effect to *Bell*. It has dismissed for lack of federal jurisdiction claims that are "wholly insubstantial" and "immaterial under the federal statute" and has looked beyond the jurisdictional allegations on the face of the complaint to determine whether on the undisputed facts the claim arises under a federal statute. If this case does not "arise under CERCLA", there is no subject matter jurisdiction. Moreover, this case falls within the narrow category of cases that could be dismissed both for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted. Federal Rule of Civil Procedure 12(h)(3) precludes waiver of challenges to subject matter jurisdiction.

would require the Court to draw inference after inference about purported legislative trade-offs".

The position of the Government dramatically illustrates why this Court should take this case. With respect to a statute as important as CERCLA, the legal doctrine post-*Landgraf* concerning the ability of courts to give retroactive application to a statute that is silent on the issue appears to be no clearer than it was before *Landgraf*. Two parties can take an ambiguous legislative history and use it to reach inconsistent conclusions. The judicial system demands more certainty and predictability in areas of such importance.

Respectfully submitted,

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